APPEAL NO. 060389
FILED MAY 8, 2006

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on November 30, 2005, and concluded on January 17, 2006. With regard to the only issue before her the hearing officer determined that the respondent (claimant) was entitled to lifetime income benefits (LIBs) "based on total and permanent loss of use of both hands and both feet."

The appellant (carrier) appealed contending, among other things, that the standard set out in Travelers Insurance Company v. Seabolt, 361 S.W.2d 204 (Tex. 1962) (Seabolt) was not followed and that the "[e]vidence conclusively establishes that the condition of the claimant's feet and hands does not preclude claimant from obtaining and retaining employment requiring the use of the feet or hands." The claimant responds citing medical reports that support his position and urges affirmance.

DECISION

Reversed and rendered.

The claimant, a truck driver, testified how on ___, he tripped and fell on some boxes injuring his neck. The parties stipulated that on ___, the claimant sustained a compensable cervical injury. The medical records indicate that the claimant had cervical spinal surgery on ___ and March 2, 1999, involving multiple level diskectomy fusion from C3 through C6-7. The record also indicates that he requested and apparently received supplemental income benefits (SIBs) from April 2004 through early October 2005 based on good faith job searches.

Although not specifically referenced the claimant apparently claims entitlement to LIBs based on one or more of the provisions in Section 408.161(a) to include subsections: (2) loss of both feet at or above the ankle; (3) loss of both hands at or above the wrist; (4) loss of one foot at or above the ankle and the loss of one hand at or above the wrist; and (5) an injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg. Section 408.161(b) provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. In Appeals Panel Decision (APD) 022129 decided October 3, 2002, the Appeals Panel compared Sections 408.161(a) and (b) with the predecessor statutes; took note of the pertinent commentary in 1 MONTFORD, BARBER & DUNCAN, A GUIDE TO TEXAS WORKERS' COMP. REFORM § 4b.31 at 4-135 footnote 468; and held that "total loss of use" of a member of the body means that such member no longer possesses any substantial utility as a member of the body, or the condition of the injured worker is such that the worker cannot get and keep employment requiring the use of such member, the test set forth in Seabolt, *supra*. *See* APD 941065 decided September 21, 1994. We have also noted that the Seabolt test is disjunctive

and that a claimant needed only satisfy one prong of the test in order to establish entitlement to LIBs. *See* APD 022129. The hearing officer in this case apparently found entitlement based on Sections 408.161(a)(2) loss of both feet at or above the ankle (*See* Finding of Fact 11 and Conclusion of Law 3) and 408.161(a)(3) loss of both hands at or above the wrist (*See* Finding of Fact 10 and Conclusion of Law No. 3). Although there was some evidence of paralysis and "quadriparesis" the hearing officer's determination does not appear to have been based on Section 408.161(a)(5) injury to the spine that results in permanent and complete paralysis of both arms, both legs, or one arm and one leg.

(Dr. ER), apparently a Texas Department of Insurance, Division of Workers' Compensation (Division) doctor, in a report dated May 10, 2005, recites how the claimant's compensable injury "resulted in quadriparesis" and comments on the claimant's clinical history. In response to two questions Dr. ER said:

> YES-He has lost complete permanent to paralysis [*sic*] to both arms and legs. He had a complete paralysis of arms and legs. He did have partial paralysis of arms and legs with spastic symptoms, difficulty walking, unable to use his right hand, which is his dominant side.
>
> YES-The claimant has some use of his arms and his legs, but there [*sic*] will not enable him in any way to perform any sort of work even at a sedentary level because of the spasticity [muscles are stiff and the movements awkward] and weakness of his hands and arms and leg. There will be no way that he would be employed.

Similarly (Dr. L) who the hearing officer identifies as a board-certified neurologist and required medical examination doctor, in a report dated January 26, 2005, responded to questions that the claimant has not only "quadriparesis but bilateral claw hands, which means he is unable to perform any type of work at the present time." (Dr. P), the treating doctor in a report dated September 20, 2004, was referred to the language of Section 408.161(a)(2), (3) and (4), marked "yes" that claimant suffered a "total loss of both feet at or above the ankle," a "total loss of both hands at or above the wrist" and a "total loss of one foot at or above the ankle and one hand at or above the wrist." Dr. P explained that the claimant had "quadriparesis and there is severe or marked weakness of hands and arms" and that "[h]e cannot walk w/o assistance." Dr. P concludes that "'Severe Quadriparesis' renders the patient completely disabled."

However, Dr. P in a report dated April 15, 2004, comments that the claimant "states that he walks three miles every day and that is what keeps him going and in good physical health." (Dr. FR) in a report dated March 18, 2005, comments that the claimant is able to walk with the aid of a cane, that he uses both arms and that there "is no complete paralysis of either both arms or both legs or one arm or one leg" referring to Section 408.161(a)(5). Dr. FR also comments that the claimant is "able to do some sedentary work."

The carrier points out that the claimant applied for and apparently received SIBs for the third, fourth, fifth, sixth and eighth quarters where he sought employment with 269 different employers on 269 different dates (with qualifying periods from early April 2004 to early October 2005). The evidence reflects that the claimant's contact with the 269 potential employers was made in person. The carrier also points out that the claimant's testimony was that his left hand and left arm "is pretty normal" (CCH transcript page 19).

The claimant, apparently in 2001, attended college and at some time received a Bachelor's Degree in Business Administration. (Transcript page 16). The evidence also indicates that the claimant applied for a position as a "sub teacher because he feels that he is able to perform that type of job and one is able to work when needed." (Carrier Exhibit J page 19). The claimant apparently obtained an elementary school teaching position (possibly in 2003, Transcript page 16) but "couldn't keep up with [the] work" because he had "difficulty trying to keep their attention because of the constant pain" but not because he had the loss of use of his legs and arms.

Not mentioned in the hearing officer's decision is a DVD video admitted as Carrier's Exhibit D. That video has segments from the morning of January 18, 2005, and the afternoon of January 28, 2005. The video shows the claimant walking, carrying his cane, putting the cane in the back of his pickup truck with his right hand, opening doors, getting in and out of his large pickup truck, carrying papers in his left hand and negotiating stairs with difficulty. The video contradicts Dr. L's January 26, 2005, comment that the claimant "is unable to perform any type of work at the present time." We note that the videos of January 18 and January 28, 2005, were taken in the same general timeframe as Dr. L's report. The video also contradicts Dr. P's September 20, 2004, report that the claimant "cannot walk without assistance." The video does support Dr. P's April 15, 2004, comment that the claimant walks three miles a day, Dr. FR's March 18, 2005, report, and the claimant's testimony that he can drive.

In a report dated March 18, 2005, Dr. FR notes that the claimant "uses both arms, although he may have some weakness in both hands and unable to do finer movements with his hands. There is no complete paralysis of either both arms or both legs, or one arm or one leg." Dr. FR goes on to state that the claimant "could be able to do some sedentary work." Subsequently in a May 10, 2005, report Dr. ER does not differentiate among the body members and simply states that the claimant cannot work at a "sedentary level because of the spasticity [defined as the muscles are stiff and the movements awkward in Dorland's Illustrated Medical Dictionary (28th edition 1994)] and weakness of his hands and arms and leg." As pointed out above the DVD video and supporting medical evidence clearly refute Dr. ER's comment on the leg (or legs). Similarly, Dr. L in his reports of January 26 and March 28, 2005, only refers to "bilateral claw hands" without specific reference to left or right or that they no longer possess any substantial utility. The DVD video shows the claimant walking carrying his four pronged cane in his right hand and putting the cane in the back of his pickup truck with his right hand. The claimant opens and closes the door of his pickup truck with his left hand and on errands holds papers in his left hand. In answers to interrogatories (Carrier's Exhibit

K) the claimant stated that he can drive, apparently without limitations, but is "unable to reach overhead" and has "club hands mostly to my right hand." As mentioned previously, it appears undisputed that the claimant can, and does, regularly drive his pickup truck without difficulty. The claimant, at the CCH, testified that his "left arm is pretty normal" and that he can grasp things in his left hand. That testimony is supported by the DVD video. We reverse the hearing officer's determination that the claimant does not possess the ability to get and keep employment requiring the use of his hands (Finding of Fact No. 8) and that the claimant has a total and permanent loss of use of both of his hands (Finding of Fact No. 10).

We acknowledge that the record contains conflicting evidence. The dissent correctly notes that Dr. ER noted in his May 2005 report that the claimant cannot perform any sort of work because of the spasticity and weakness in his hands. However in that same report, Dr. ER fails to mention any problems the claimant may be having with his left hand. Dr. P's September 2004 report lacks credibility. In the September 2004 report, Dr. P opines that the claimant's "function of his upper and lower extremities has been lost in or about an 85 to 90%." This conclusion is contradicted not only by the DVD surveillance but also by medical records which track the claimant's progress. The records evidence that the claimant increased the distance he walked from 1 ½ miles to 2 miles every other day to 3 miles a day (by April 15, 2004). Further, Dr. P notes in a report dated January 31, 2002, that the claimant is "improving considerably and is generally better." In the January 31, 2002, report Dr. P also notes that the claimant has no sensory abnormality and no muscle atrophy. In a report dated August 11, 2003, Dr. P notes that the claimant is "doing his regular daily activities" and in a report dated November 25, 2003, notes that the claimant is ambulating with the aid of a cane, but is able to walk without it. Dr. M's August 2000 report as noted by the dissent does note an obvious wasting of interosseous musculature of the claimant's hands but also notes that the claimant cannot drive which is contradicted by the claimant's answers to interrogatories in evidence, his testimony, and the DVD surveillance video.

In summary, Section 408.161(a) provides that LIBs are paid for: (2) loss of both feet at or above the ankle or (3) loss of both hands at or above the wrist. Section 408.161(b) provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. The Texas Supreme Court in Seabolt, *supra,* defined a total loss of use of a member exists whenever, due to the injury, such member no longer possesses any substantial utility as a member of the body or "the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member." Clearly based on the evidence and DVD video the claimant has not lost his feet or hands. The question becomes whether he no longer possesses any substantial utility of his hands and feet or that the condition of his hands or feet is such that he cannot procure and retain employment requiring the use of his hands and feet. While the medical evidence may be conflicting, it is uncontradicted that the claimant had tried to obtain an elementary school teaching position and the reason for leaving that program was for other reasons "([inability] to work with kids...difficulty trying to keep their attention because of the constant pain)" rather than

the loss of use of his hands or feet. Furthermore, the great weight of the evidence, both testimonial and on the DVD video, is that the claimant can, and does drive which requires use of the hands and feet. Because the claimant cannot perform "minor fine movements" with his hands obviously does not preclude him from doing gross movements including driving. For these reasons, we hold that the claimant has not met the requirements to prove that he has a total loss of use of his hands and feet, that he no longer possesses any substantial utility of his hands and feet and that he cannot procure and retain some employment requiring the use of his hands and/or feet.

We hold that the claimant has failed to prove that he has a loss of both feet at or above the ankle or a loss of both hands at or above the wrist or a loss of one foot at or above the ankle and loss of one hand at or above the wrist with total loss of use as defined in Seabolt, *supra*. We reverse the hearing officer's decision that the claimant is entitled to LIBs based on total and permanent loss of use of both hands and both feet and render a new decision that the claimant is not entitled to LIBs.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

RUSSELL RAY OLIVER, PRESIDENT
6210 HIGHWAY 290 EAST
AUSTIN, TEXAS 78723.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Margaret L. Turner
Appeals Judge

DISSENTING OPINION:

I respectfully dissent. I would affirm the hearing officer's determination that the claimant is entitled to LIBs based on the hearing officer's findings that the claimant does not possess fine motor functions of his hands, that he suffers quadriparesis as a result of his compensable injury, that he does not possess the ability to get and keep employment requiring the use of his hands, and that he has a total and permanent loss of use of both of his hands. It is undisputed that the claimant sustained a compensable cervical injury for which he underwent two surgeries at multiple disc levels.

Section 408.161(a) provides in pertinent part that LIBs are paid until the death of the employee for: (3) loss of both hands at or above the wrist. Subsection (b) of Section 408.161 provides that for purposes of Subsection (a), the total and permanent loss of use of a body part is the loss of that body part. In Seabolt, *supra*, the Texas Supreme Court explained that "[a] total loss of use of a member exists whenever by reason of injury, such member no longer possesses any substantial utility as a member of the body, or the condition of the injured member is such that the workman cannot procure and retain employment requiring the use of the member." The court further explained that "[s]hould the evidence be sufficient in law to satisfy either of the two requirements stated above the judgment should be affirmed, otherwise a reversal must be ordered." The court also explained that "[a]lthough a member may possess some utility as a part of the body, if its condition be such as to prevent the workman from procuring and retaining employment requiring the use of the injured member, it may be said that a total loss of the use of a member has taken place."

In Pacific Employers Insurance Company v. Dayton, 958 S.W.2d 452 (Tex. App.-Fort Worth 1997, pet. denied), a LIBs case decided under the 1989 Act, the court rejected the argument that the standards applied to loss of use under the prior law should not apply to cases decided under the 1989 Act and, therefore, rejected the contention that the trial court's charge to the jury regarding total loss of use, which contained the Seabolt standard, contained an incorrect statement of the law. The court also noted that the definition of "total loss of use" as applied to the 1989 Act should include the requirement of Section 408.161 that the loss of use be both total and permanent.

In Hartford Underwriters Insurance Company v. Burdine, 34 S.W.3d 700 (Tex. App.-Fort Worth 2000, no pet.), a LIBs case decided under the law prior to the 1989 Act, the court affirmed a judgment awarding LIBs based on a jury finding that the injured employee, who had suffered a back injury, had suffered a total and permanent loss of use of both feet at or above the ankles, and in doing so the court specifically cited former Article 8306 Section 11a(2) (providing for LIBs for the loss of both feet at or above the ankle), after noting the provision regarding total and permanent loss of use in former Article 8306 Section 10(b). Although in discussing other court decisions, the court in Burdine mentioned the "other loss" provision in former Article 8306 Section 11a (providing that "[t]he above enumeration is not to be taken as exclusive. . ."), which

provision is not in Section 408.161, the court's decision in Burdine was not based on the "other loss" provision of former Article 8306 Section 11a as asserted by the carrier in its appeal in the instant case. The court stated that "[q]uestions three and four specifically tracked the language of Section 11a(2) and clearly supported a finding of total and permanent loss of use of both feet at or above the ankles for purposes of an award of lifetime benefits." The court rejected the contention that evidence of the employee's back injury did not support the jury's findings that the employee suffered an injury to both her legs or feet at or above the ankles. There was evidence that the injury to the nerve roots in the lower back caused a muscular malfunction in the feet and the medical records indicated that the back injury resulted in problems with the functioning of both her legs and both feet at or above the ankles. The court also noted that there was evidence to support the jury's finding of total loss of use under the Seabolt standard.

There is conflicting evidence in the present case, but I believe that there is sufficient evidence to support the hearing officer's decision with regard to LIBs entitlement based on total and permanent loss of use of both hands and that such determination is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Medical evidence supporting the hearing officer's determination with regard to the claimant's hands consists of several medical reports. Dr. ER noted in May 2005 that the claimant's right hand is clinched to the extent that he cannot extend his fingers, that the claimant's quadriparesis is secondary to his work-related spinal cord injury, and that the claimant cannot perform any sort of work because of the spasticity and weakness of his hands. Dr. L noted in January 2005 that the claimant has developed bilateral claw hands associated with radiculopathies, that he has severe atrophy of the interoseous muscles of both hands, that the claimant is unable to perform any fine movements with his hands, and that the claimant is unable to perform any type of work. Dr. L also noted that the claimant's work-related cervical injury left him not only with quadriparesis, but also with bilateral claw hands, and that the claimant has multiple cervical radiculopathies bilaterally. Dr. L explained in March 2005 that the claimant's bilateral chronic radiculopathies, which left him with claw hands, means that the claimant has chronic flexion contractures of his hands and, therefore, cannot perform any work that requires a minor fine movement. Dr. P noted in September 2004 that the claimant has quadriparesis, severe or marked weakness of his hands, loss of fine grip, and limited range of motion of his upper extremities. Dr. P wrote in March 2004 that as a result of his work injury, the claimant has permanent spinal cord damage resulting in quadriparesis, which he noted was severe muscle weakness of both upper and lower extremities, and that the claimant is considered permanently and totally physically disabled from any type of gainful work activity. Dr. P noted in April 2000 that with regard to the use of the upper extremities, the claimant has no digital dexterity, but has clumsy movements of both his upper extremities. Dr. P noted in May 2000 that he felt that the claimant will not be able to work due to his lack of fine control and that his condition is permanent. (Dr. M) noted in August 2000 that the claimant had obvious wasting of the interosseous musculature of his hands.

The video of the claimant is inconclusive regarding what work, if any, the claimant might be able to perform using his hands. The claimant is right-handed. On direct examination he testified that his right hand is constantly in a claw-hand position, but that he has a little more flexibility with his left hand, and showed the hearing officer his hands. The claimant did agree at the CCH during cross-examination that his left hand is "pretty normal" and that he can grasp things with his left hand, but he also explained on redirect examination that it is with a lot of difficulty that he can button a shirt with his left hand, that it was with great difficulty that he used a computer for his classes, that he does feel that his left hand has paralysis to some extent, and that his left hand is not completely normal. The claimant's Applications for SIBs for the third through the eighth quarters reflect multiple job searches, but he also marked on each application that he was not able to work in any capacity and that his doctor had documented that he cannot do any type of work in any capacity. The record does not reflect that any employment resulted from the job searches for those quarters.

Based on the above, I would affirm the hearing officer's decision of entitlement to LIBs.

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Robert W. Potts
Appeals Judge